

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1266 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

MAHMAD SHARIF SULEMANBHAI MAREDIYA

Versus

HABIBBHAI IBRAHIMBHAI MAREDIYA

Appearance:

MR SURESH M SHAH for Petitioner

MR DK ACHARYA for Respondent No. 1, 2

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 01/11/96

ORAL JUDGEMENT

Rule. Mr.D.K.Acharya, ld. Advocate waives service of notice of the rule for the respondents. By the consent of both the learned Advocates appearing for the parties this CRA is taken up for final hearing today and the same shall stand disposed of by this judgment.

2. The petitioner, by filing this CRA under S.115 of the Code of Civil Procedure has challenged the order

dated 20.7.1996, passed by the learned 2nd Joint Civil Judge (JD), Palanpur, below Ex. 48 in Regular Civil Suit No. 147 of 1995, whereby the learned Judge rejected the said application of the petitioner - original plaintiff for appointment of second Commissioner for local inspection.

3. The petitioner-plaintiff filed Regular Civil Suit No. 147 of 1995 against the respondents - original defendants for a permanent injunction restraining them from making construction over the 30 ft. wide public road. It was alleged that the defendants while developing their plots, were trying to encroach upon the 30 ft. wide road land which is situated on the west of their plots and on the east of the plaintiff's plots. In the said suit, the defendants had filed application for appointment of Commissioner to find out the actual position of the suit lands and more particularly the 30 ft. wide public road. Pursuant to that application, Commissioner came to be appointed by the Court on 4.3.1996. The Commissioner submitted his report which is on the record at Ex.42/1. The plaintiff filed his objections at Ex.46 against the report of the Court Commissioner, and thereupon the court fixed the same for hearing by order dated 18.6.1996.

4. Thereafter the plaintiff filed application Ex.48, on 4.7.1996 requesting the court to appoint a second Commissioner. The contention of the plaintiff is that the first commissioner had not properly measured the suit plots, more particularly keeping in mind the eastern side plots. Contesting the said application Ex.48 filed by the plaintiff for appointment of second commissioner, the defendants filed their reply at Ex.50. The learned trial Judge after hearing the learned Advocates, rejected the application Ex.48 for appointment of second commissioner, by his order dated 20.7.1996, which is the subject matter of this revision application.

5. It must be stated that the trial court had failed to appreciate that to the report of the first commissioner at Ex.42/1, the plaintiff had filed his objection at Ex. 46, which was fixed for hearing. Therefore, before deciding the application at Ex.48 for appointment of second commissioner, the learned trial Judge ought to have considered the plaintiff's objections at Ex.46. It needs hardly to be stated that when the report of the first Commissioner was filed in the court, the application for appointment of second commissioner could not be entertained unless the report of the first commissioner is set aside. The learned trial Judge, in

hot haste, while deciding the application Ex.48, which is the subject matter of this revision application, did not consider the objections filed by the plaintiff at Ex.46. It is the settled principle of law that once a Commissioner is appointed to make local investigation of the subject matter of the suit, second commissioner cannot be appointed for the same purpose. In the present case, the plaintiff had already filed his objections at Ex.46 against the report of the first commissioner dated 4.3.1996, which was produced on record at Ex.42/1.

6. In view of the above facts of the case, it is clear that the learned Judge has acted illegally and with material irregularity in exercise of his jurisdiction and therefore, this civil revision application deserves to be allowed, and the learned trial Judge is required to be directed to hear and decide the objections Ex.46 filed by the present petitioner - original plaintiff against the report of the first commissioner at Ex.42/1, and after deciding the objections at Ex.46, to decide the application which may be filed by the plaintiff for appointment of commissioner for local inspection.

7. As a result of the foregoing discussion, the CRA is allowed. The impugned order dated 20.7.1996 passed by the learned Civil Judge (JD), Palanpur, below Ex.48 in Regular Civil Suit No. 147/95 is quashed and set aside. The learned trial Judge is directed to hear and decide the objections at Ex.46 filed by the plaintiff against the report of the first commissioner which is on the record at Ex.42/1. It would be open to the plaintiff to apply afresh to the trial court for appointment of a commissioner for local inspection after the objections at Ex.46 are heard and decided. Rule made absolute with no order as to costs.

abraham.